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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-497

THE STATE OF OKLAHOMA,
Petitioner,

VERSUS

THE CHEROKEE NATION, THE CHOCTAW NATION, and
THE CHICKASAW NATION,
Respondents.

RESPONSE OF THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA

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October, 1972

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Comes now the respondent, Commissioners of the Land Office of the State of Oklahoma, pursuant to United States Supreme Court Rule Number 21, paragraph 4, and advises the Court that said respondent was an appellant in Causes No. 71-1210 and 71-1295, United States Court of Appeals for the Tenth Circuit. It is further alleged and averred by this respondent that the Commissioners of the Land Office, as Trustees for the Common Schools of Oklahoma have exercised dominion and control over the lands which are the subject matter of this controversy since the admission of Oklahoma as a State.

CONCURRENCE OF COMMISSIONERS OF THE LAND OFFICE WITH ALLEGATIONS OF FACT AND LAW AS PRESENTED BY PETITIONER

Respondent, Commissioners of the Land Office, concurs in each and every allegation as presented in the Petition for the Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, which was filed in this cause by the State of Oklahoma.

ADDITIONAL ARGUMENT BY RESPONDENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent, the Commissioners of the Land Office, for further argument in support of the State of Oklahoma's Petition for a Writ of Certiorari alleges and avers that one of the major elements in the finding of the Court in *Choctaw Nation, et al.* v. *Oklahoma, et al.*, 397 U.S. 620, that ownership of the lands in question vested in the Indian Tribes was based on the fact that the Indians had sold sand and gravel from the river bed; thus indicating that all parties concerned had the intent that ownership of the river bed should vest with the Indians. We agree with the Court in *Choctaw Nation, et al.* v. *Oklahoma, et al., supra*, wherein the following language was used:

> "As a practical matter, reservation of the river bed would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects however, the Indians were promised virtually complete sovereignty over their new lands. See Atlantic & Pa-

cific R. Co. v. Mingus, 165 U.S. 413, 435-436 (1897). We do not believe that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise. Nor do we believe that the United States would intend that it rather than petitioners have title to the dry bed left from avulsive changes of the river's course, which as the District Court noted are common in this area. Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce. Cf. Pollard v. Hagan, 3 How. 212, 229 (1845)."

Respondent would further refer to footnote number 7 in Mr. Justice Douglas' concurring opinion wherein we find the following language:

"The Cherokee Nation claims to have negotiated some 13 sand and gravel leases for the bed of the Arkansas River between April 12, 1883 and May 27, 1893 —prior to the admission of Oklahoma into the Union. The record does not disclose the date when the State of Oklahoma first assumed the role of lessor of the river bed, although several cases have involved such leases by the State. See, e.g., Lynch v. Clements, 263 P.2d 153."

Respondent argues that there is no evidence or indication that the Indians sold any sand or gravel after Statehood. The question should be reviewed as to whether the subsequent open and notorious sale of such sand and gravel by the Commissioners of the Land Office and the payment of the proceeds thereof to the Common Schools of the State

of Oklahoma should not be considered as an evidentiary matter indicating that the Indians, the United States of America and the State of Oklahoma had a tacit meeting of the minds that title to the river bed did indeed pass to the State of Oklahoma for the use and benefit of the school system of the State of Oklahoma.

CONCLUSION

Respondent concurs in each and every allegation of petitioner, State of Oklahoma, and further, argues that the overt act of the Commissioners of the Land Office of selling sand and gravel and applying the proceeds to the use and benefit of the Common Schools constitutes agreement, by the parties herein, to reversion of the title of the river bed to the State of Oklahoma.

WHEREFORE, premises considered, respondent prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this above captioned case on June 1, 1972, in Causes No. 71-1210 and 71-1295 in that Court.

Respectfully submitted,

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